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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 878

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN,

Petitioner,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Elmer Sullivan, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Pennsylvania, being the highest court of said State, in the above captioned case, the opinion and decision of said court having been rendered and filed January 11, 1937 (R. 33).

Question Involved.

Is the Act of Assembly of Pennsylvania, March 31, 1860, P. L. 382, Sec. 3, providing for punishment of escaped prisoners, of itself and as construed and applied herein, in

violation of the Fourteenth Amendment of the Constitution of the United States because of a denial of Due Process of Law and of the Equal Protection of the Laws?

The Act of 1860, March 31, P. L. 382, Section 3, reads:

> "*Escape or Rescue of Prisoners—Escape and Breaking Prison.*—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him. (1860, March 3, P. L. 382, Sec. 3.)"

Similar acts have been held invalid in *Ex parte Mallon,* 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 287 Pac. 729, 46 Okla. Cr. App. 233, and *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, on the ground that they were based on an unreasonable classification, operated unequally and deprived the prisoner of due process of law and the equal protection of the laws in

violation of the Fourteenth Amendment of the Constitution of the United States. Thus, if a prisoner serving five years escaped in concert with a prisoner serving ten years, the five-year prisoner could be sentenced to an additional five years, and the ten-year prisoner to an additional ten years for identically the same act. Further, the length of punishment is assessed at haphazard, being based not upon the essential heinousness of the act of escaping, but upon the purely adventitious circumstances of the duration of the former sentence.

Statement.

Petitioner, Elmer Sullivan, on April 26, 1929, entered a plea of guilty in the Court of Quarter Sessions of Erie County, Pennsylvania, at No. 25 May Sessions, 1929, to the following charge:

> 1st Count: Breaking and entering store building with intent to commit a felony therein;
> 2nd Count: Larceny.

He was sentenced by Judge William E. Hirt, as follows:

> "April 26th, 1929. And now, the Court sentence the defendant, Elmer Sullivan, to pay a fine of One Hundred Dollars to the Commonwealth (for the use of the County of Erie), pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in the Western Penitentiary of Pennsylvania (situate in the County of Allegheny), by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three years, and the maximum Six years, there to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with."

Petitioner was forthwith committed to the Western Penitentiary of Pennsylvania to serve said sentence.

Subsequently, on the 7th day of February, 1930, Petitioner was transferred to the Prison Farm, known as Rockview, situate in Centre County, State of Pennsylvania. On the 28th day of December, 1931, he escaped from the aforesaid Prison Farm, and shortly thereafter was apprehended.

On the 28th day of December 1931, Petitioner was indicted by the Court of Quarter Sessions of the Peace in and for the County of Centre, as follows:

> "The said Elmer Sullivan did wilfully, unlawfully and maliciously break out of said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvaina."

On the 31st day of December, 1931, Petitioner was sentenced by Judge M. Ward Fleming, of the Court of Centre County, Pennsylvania, on the said charge of breaking out of prison as follows:

> "And now, December 31, 1931, the sentence of the Court is that you, Elmer Sullivan, pay the costs of prosecution, a fine of One Dollar ($1.00), and undergo imprisonment in the Western Penitentiary of the State of Pennsylvania for a period of not less than three years nor more than six years, to be computed from the expiration of your original sentence from Erie County, and that you stand committed until such sentence is complied with."

Petitioner in his petition for a writ of habeas corpus set forth that he is at the present time confined in the Western Penitentiary of Pennsylvania, in Allegheny County, Pennsylvania; that he is confined there illegally and by virtue of said illegal confinement is restrained of his liberty contrary to law. The opinion and judgment of the Court shows that the principal ground alleged was the unconstitutionality of the Pennsylvania statute with respect to Section 1 of the

Fourteenth Amendment to the Constitution of the United States. The court below specifically passed on the constitutional question (R. 34-37).

Jurisdiction.

The final order of the Supreme Court of Pennsylvania discharging the rule to show cause why a writ of habeas corpus should not be issued was entered January 11, 1937 (R. 33). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

ARGUMENT.

The basis of petitioner's application for a writ of habeas corpus was the alleged unconstitutionality of the Pennsylvania statute with respect to the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. As will be seen from the brief attached hereto, the Pennsylvania statute operates to make the period of confinement for the crime of escaping from prison dependent not upon the intrinsic gravity of that offense but upon the prior offense conviction of which resulted in the prisoner's confinement in the first instance. The result is that if two prisoners are confined in a penitentiary, one for five years and the other for ten, and escape together, the sentence assessable would be five years for the one and ten years for the other, whereas the criminal acts of the two were identical. Thus the statute makes as many different grades of crime as there are prisoners undergoing different sentences. The theory of punishment, that it should be proportioned to the gravity of the offense, seems violated by a statute which punishes unequally two who commit identically the same offense, making the amount of punishment dependent upon something which was not part of the escape, but occurred long prior thereto.

Ex parte Mallon, 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 46 Okla. Cr. Ap. 233, 287 Pac. 729. See also *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168. All hold that statutes similar to the present statute are arbitrary, unreasonable, operate unequally and are contrary to the Due Process and Equal Protection provisions of the Fourteenth Amendment of the Constitution of the United States.

As shown in the present brief, the contention that the sentence on which the culprit is first imprisoned is a mere conditional one dependent upon non-escape, and that, therefore, the prisoner is on notice that if he escapes he may be compelled to serve double the original sentence, reduces itself to the argument that an unreasonable classification and an unequal statute, within the meaning of the Fourteenth Amendment, is rendered reasonable and equally operative, by giving notice of it beforehand to those affected. This seems illogical, particularly when the notice is a mere fiction of law achieved by writing the statute on the statute books where all presumably should read it.

Reasons for the Allowance of the Writ.

There is a clear conflict between the decision in the present case and the decisions of the highest courts of other States in *Ex parte Mallon,* 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 46 Okla. Cr. App. 233, 287 Pac. 729. See also *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, holding that similar laws were unconstitutional, being in violation of the clauses of the Fourteenth Amendment of the Constitution of the United States guaranteeing due process of law and the equal protection of the laws. In addition, the highest court in Pennsylvania in the present case has decided a Federal question of substance not heretofore determined by this Court and probably contrary to the applicable decisions of this Court and of the highest courts of various States of the United States.

Further, the question involves the liberty and freedom of a large number of men in the State of Pennsylvania, at least ninety in the Western penitentiary and many more in the Eastern penitentiary.

ELMER SULLIVAN,
Petitioner.

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BRIEF IN SUPPORT OF PETITION.

I.

The statute herein is violative of the Due Process and equal protection provisions of the Fourteenth Amendment and the decision below is in conflict with the decisions of the highest courts of other states with regard to similar statutes.

The Act of Assembly of March 31, 1860, P. L. 382, Section 3 reads:

> "*Escape or Rescue of Prisoners—Escape and Breaking Prison.*—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped,

> or broke prison although no actual escape was made by him. (1860 March 31, P. L. 382, Sec. 3.)''

Only the latter part of the above statute is involved in the present case. Apparently there are no decisions of Pennsylvania Courts on the present question.

In *In re Mallon,* 16 Idaho 737, 103 Pac. 374, the Supreme Court of Idaho held unconstitutional, as violative of the Fourteenth Amendment of the Constitution of the United States, a similar statute providing as follows:

> ''Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. (Sec. 6452, Revised Codes of Idaho.)''

In ruling on the precise question herein the court said:

> ''It will be observed that the punishment to be inflicted under this statute depends entirely upon the sentence the convict is serving at the time of the escape. If a convict is serving a one year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional year from the expiration of the first sentence.
>
> ''If a convict is serving a twenty year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional twenty years from the expiration of the first sentence. A maximum and minimum penalty, within which the court is given the discretion to fix the punishment according to the gravity of the offense, is not permitted. The offense is not divided into grades, unless it can be said that the grade of the crime is fixed by the sentence from which the convict is escaping; and the attorney general adopts this contention and argues that the statute does graduate the punishment according to the offense for which

the convict was serving at the time of the escape, and that this is a proper and reasonable classification.

"We think it may be stated as a general proposition of law that every person is entitled to the equal protection of the law, and that equal protection of the law means that equal protection and security should be given to all under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burden and charge than are equally imposed upon all others under like circumstances. (8 Cyc. 1058; *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 27 L. Ed. 924.) Under this statute there would be as many different grades of crime as there are prisoners undergoing different sentences. A convict undergoing a one year sentence may conspire with a convict undergoing a twenty year sentence in planning and executing an escape, and may be the one who conceived the notion to escape, devised the plans and merely used the twenty year convict in executing such plans; yet, notwithstanding this fact, the latter, in case of conviction for escape, is required to serve an additional twenty year sentence after the expiration of the term for which he is serving, while the former is required to only serve a one year additional sentence. To say that the long term convict commits a greater offense than the short term convict is to base the punishment for such escape not upon the act of escaping from a State prison, but upon the act of escaping from a punishment fixed by a court in the judgment of conviction. The statute in defining the offense, however, makes the escape from the State prison the offense and not the escape from the punishment of the judgment fixed by the court upon trial. This classification is not natural, but arbitrary. To justify a classification of grades of crime, there must appear some good and valid reason why the classification should be made as made." * * *

"The very theory of punishment, to be imposed for violations of the law, is that such punishment should be proportioned to the gravity of the offense. For a

> statute to say that a convict confined in the State prison for a term of six months (as an illustration), who by force and violence breaks out of such State prison, upon conviction for such escape can only be confined for the term of six months, while a convict who peaceably escapes, without resorting to force or violence, shall be subject to a twenty year sentence because at the time of the escape he was serving such a sentence, is fixing an abritrary, unnatural and unjust punishment, and is contrary to the spirit and in violation of the Constitution of the United States as well as the Constitution of this State. While the legislature in prescribing and fixing punishment for crime, has very great latitude in classifying the same, still the rule is well recognized, that in making such classification it should be natural and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime." (In re Mallon, 16 Idaho, 743, 744, 745.)

The court then said:

> "a classification based upon the character of sentence being served is, in our judgment, arbitrary and unreasonable, and a clear violation of the provisions of the Constitution of this State and the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person equal protection before the law." (In re Mallon, 16 Idaho, 748.)

State v. *Johnsey*, 46 Okla. Cr. App. 233, 287 Pac. 729, is to the same effect with regard to a similar statute reading as follows:

> "Any person committed to a State prison who shall escape from or break said State prison with intent to escape therefrom, or who shall attempt by force or violence, or in any other manner, to escape from said prison, whether such escape be effected or not, shall upon conviction thereof be punished by imprisonment in said prison for a term not exceeding double the

term for which he was so sentenced, to commence from and after the expiration of his former sentence." (State *v.* Johnsey, 287 Pac. 729.)

The court said:

"The very theory of punishment to be imposed for violations of the law is that such punishment should be proportioned to the gravity of the offense. While the Legislature in prescribing and fixing punishment for crime has very great latitude in classifying the same, still such classification should be natural and not arbitrary and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. The authorities are practically unanimous upon the question that the classification must be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. *State* v. *Lewin,* 53 Kan. 679, 37 P. 168; *Ex parte Mallon,* 16 Idaho 737, 103 P. 374, 22 L. R. A. (N. S.) 1123; *Hurtado* v. *Calif.,* 110 U. S. 516-534, 4 S. Ct. 292, 28 L. Ed. 232; 8 Cyc. 1058, 1059; *Barbier* v. *Connolly,* 113 U. S. 27, 5 S. Ct. 357, 27 L. Ed. 924.

"An examination of this statute leads to the conclusion that the classification is arbitrary, and that the punishment is not fixed according to the heinousness or gravity of the act, but is left to be fixed by matters occurring independent of the crime.

"Section 8361, *supra,* is unconstitutional for the reason that it violates that part of the Fourteenth Amendment to the Constitution of the United States of America which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws. *Bowman* v. *Lewis,* 101 U. S. 22, 25 L. Ed. 989; *In re Kemmler,* 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 524." (State *v.* Johnsey, 287 Pac. 730.)

In *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, the statute involved was somewhat different, but the principle was the same. The statute reads:

"Sec. 28. That in case any convict shall escape from the penitentiary, or from the custody of any officer, or to make an attempt to so escape, or shall join in any mutiny, or shall make an attempt at mutiny, or in any manner do any act to cause others to mutiny, while in confinement in the State penitentiary, or while in the custody of any officer, the said convict shall be taken by the warden before the district court of Leavenworth county, on information filed by the warden; and if the charge be sustained, the time said convict had served in the penitentiary prior to such act as charged shall not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court of confinement in the State penitentiary for the full term for which he or she was sentenced by the court before whom he or she was convicted and undergoing sentence at the time of the violating the provisions of this section: provided, that no limitation shall bar proceedings under this section." (State *v.* Lewin, 37 Pac. 168, 169.)

After holding that this statute was unconstitutional with respect to the State Constitution the court said:

"The section is open to other serious constitutional objections. Its provisions do not commend themselves to our sense of justice. The punishment required to be imposed is not to be measured by the offense committed, but is made to depend wholly on the date of the sentence under which the prisoner was confined in the penitentiary at the time he committed the act for which he is punished. The court is required simply to obliterate the time that he has been confined in the penitentiary, for his original offense, and, as a punishment for the escape or mutiny, to reimpose the sentence given by the court for his prior crime. So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day, in concert, under precisely the same circumstances, and with exactly equal guilt, would receive wholly different punishment. If one had been confined but for

a day, his punishment would be increased but by one day, while the other, who might have been confined for 20 years, would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws? The inherent vice of such an enactment is not fully apparent until the fact is recognized that at the penitentiary, where there are no witnesses of what transpires but convicts and officers, the oath of a convict would have little weight against that of an officer, and a charge preferred and backed up by the oath of an officer would in most cases insure a conviction, thus unduly increasing the necessarily great power of the warden over the inmates under him. We are not disposed to strain our construction of constitutional safeguards to uphold such a statute. We think section 28 wholly void, and the order of the district court, quashing the information, is sustained." (State *v.* Lewin, 37 Pac. 169.)

The Pennsylvania court in the present case specifically refused to follow the above cases (R. 37).

In addition to the cases already cited, the decision below is inferentially in conflict with this Court's decisions in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Barbier* v. *Connolly*, 113 U. S. 27; *Hurtado* v. *Calif.*, 110 U. S. 516-534; *Gulf R. Co. v. Ellis*, 165 U. S. 150; *Marchant* v. *Pa. R. Co.*, 153 U. S. 380; *Santa Clara Co.* v. *Southern Pac. R. Co.*, 118 U. S. 394, and other classic adjudications by this Court on the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

If it be argued that the sentence under which the accused was first imprisoned was a mere conditional one, dependent upon non-escape, and therefore the prisoner is on notice by reason of the escape statute that if he escapes

he must serve the additional sentence therein provided, we say in answer that an unreasonable and arbitrary classification and an entirely capricious statute is not rendered reasonable and equally operative by giving prisoners notice of it beforehand, particularly when the notice is a mere fiction of law resulting from the embedding of the statute into the statute books.

II

Considering the instant case as one representative of a large group wherein the court below has uniformly imposed the maximum sentence under the Act in question, has not the said Act been applied in such manner as to deny due process of law and the equal protection of the laws?

Reference is here made to a letter written by Judge M. Ward Fleming, Judge of Centre County, Pennsylvania, and addressed to the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania, which is to be found among the papers in the case of *Commonwealth, ex rel. Otto Rymeus,* v. *Stanley Ashe,* Warden, Western Pennsylvania Penitentiary, at Miscellaneous Docket No. 821, in the Supreme Court of the State of Pennsylvania, and is a part of the record of the said captioned case. Said letter reads as follows:

"Judges Chambers,
Forty-ninth Judicial District, Pennsylvania,
M. Ward Fleming, President Judge.

BELLEFONTE, PA., August 18, 1934.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania.

GENTLEMEN:

In the matter of Commonwealth ex rel. Otto Rymeus vs. Stanley Ashe, Warden, Western Pennsylvania Peni-

tentiary, No. 1620, October Term, 1934, by a Habeas Corpus, I beg to state that an error was committed in imposing sentence upon the relator for escaping from the prison farm at Rockview, Center County, Pennsylvania.

Since the establishment of Rockview *the policy of this Court* has been to impose upon inmates escaping therefrom, a sentence exactly the same as that originally imposed in the County from which they were committed, such sentence to be computed from the expiration of such original sentence. Cards are handed to the Court before sentence imposed showing such original sentence and the name of the County from which the inmate comes.

Whether the card was in error or we did not carefully look at the minimum sentence imposed upon Rymeus in Washington County, I cannot say. However, it appears that we made one half of the maximum of the Washington County sentence the minimum when imposing sentence for escape. The records now disclose that Rymeus was sentenced by Judge McIllvaine to not less than three years and three months to more than thirteen years. We halved the maximum of thirteen years and imposed a minimum of six and one-half years and a maximum of 13 years when imposing sentence for escape. Under the Statute our maximum sentence could not have been greater than the original sentence from Washington County and should have been three years and three months to thirteen years.

With kind personal regards, I am,

Sincerely yours,

M. WARD FLEMING."

Reference is here also made to statistics compiled by your petitioner relative to the policy of the lower court in sentencing escaped prisoners. An examination of said statistics discloses that in each case investigated or caused to be investigated by your petitioner, that the lower court has imposed the maximum sentence.

The statistics referred to consist of:

An affidavit setting forth an examination of all prisoners originally sentenced from Erie County courts, who were later confined in the Prison Farm known as Rockview, and subsequently escaped from said prison farm. The prisoners upon their apprehension within the past five years were sentenced by the Court of Quarter Sessions of Centre County, said examination and attached affidavit have been made by William W. Knox, Esq., a member of the Bar of the Supreme Court of Pennsylvania.

Also an affidavit by M. W. Gettig, a member of the Bar of Centre County, Pennsylvania, setting forth a complete record of the Quarter Sessions Court of Centre County for the past five years relative to the sentencing of escaped prisoners from the Rockview Prison Farm. These statistics and affidavits are a matter of record filed in the Supreme Court of Pennsylvania in this case and may be found in petitioner's brief to the Pennsylvania Supreme Court, copies of which accompany this petition.

Petitioner, due to lack of funds, is not able to set forth the records of all prisoners originally sentenced from other counties in this state, which prisoners were later confined to Rockview, escaped therefrom, and were subsequently sentenced from Centre County Court. Petitioner did, however, cause an investigation to be made as to all prisoners sentenced by the Erie County Court of Quarter Sessions and Oyer and Terminer, who later escaped from the Prison Farm at Rockview, and who were within the past five years sentenced on an escape charge by the Centre County Court. This investigation disclosed that in each instance they were sentenced to the maximum term by the said Centre County Court; that is, the court sentenced each of these escape convicts to a sentence the same as the original one imposed by the Erie County Courts, to be computed from the expiration of their individual original sentence. In other words,

there has been a steadfast refusal on the part of the Centre County Court to exercise any discretionary power whatsoever in sentencing these escape prisoners, but, on the other hand, each and every one was sentenced to the maximum term provided by the Act of Assembly referred to herein.

It is well to here point out that the act of the Legislature in question imposes a duty upon the court to exercise discretion, otherwise the words "not exceeding" would not have been written into the act.

Assuming that the legislature meant that the court should exercise discretion in imposing sentence under the act and assuming that there has not only been an abuse of discretion on the part of the Centre County Court, but, on the other hand, there has been a total lack of exercise of any discretion, it is therefore a fair conclusion that the Act of Assembly pertaining to prison break and escape has been applied in such manner as to deny the equal protection of the laws.

If the Centre County Court has properly used its discretion in adopting the policy of sentencing violators under the act to the maximum term, then this very fact in itself is the strongest argument that an Act of Assembly which permits the imposition of a maximum sentence in each instance is an act that deprives those who violate its terms of a fair and equal administration of justice, and further deprives such persons of the equal protection of the laws. If the Centre County Court has in the instant case and in other cases, of which the instant case is a representative one, abused its discretion in imposing the maximum sentence permitted under the act, then it is no redress for those who have been compelled to suffer the imposition of a maximum sentence merely to condone the past acts of the said court, but, on the contrary, an act so interpreted, and criminal justice so administered, is contrary to natural justice, is unfair and is in violation of the rights of all men to be treated with equality before the law.

It is submitted that the instant case should be considered as representative and not merely as a singular case. The records disclose that there are upwards of 90 men undergoing sentence under this escape act in the Eastern Penitentiary alone. These men are serving terms of from six months to 30 or 40 years or more, depending on the original sentence they were undergoing at the time they escaped. In the instant case the court sentenced the defendant for a period of three to six years for the offense of escaping and it is apparent that it is a mild punishment compared with some of the cases which the records disclose, wherein sentences were meted out to defendants for the same offense, namely, that of escape, for a period of 15, 20 and 30 and even a greater number of years. In many instances the sentence imposed by the Judge under the escape law is tantamount to a life sentence, for the defendants involved were of such an age that their expectancy of life will never permit them to regain freedom.

So far as counsel has been able to learn from a diligent search of the decisions of the United States Supreme Court, this particular question has never before been presented for the Court's consideration. While it is true that this Court has upheld the principle of additional punishment in cases involving punishment of habitual criminals, in cases such as *Missouri* v. *Lewis,* 101 U. S. 22; *Graham* v. *W. Va.,* 224 U. S. 616, nevertheless, it is contended that these cases, and the subsequent decisions following this ruling of law, do not properly apply in the instant case for the reason that in habitual criminal acts the punishment for all persons committing a second or additional offense is equal. In other words habitual criminal acts treat like offenders with equal justice.

Such is not the case under the law involved here, for, under the Pennsylvania escape law, two persons may escape, under the same circumstances and at the same time,

and receive entirely different sentences. It is contended that the substantive offense is escape and that there are as many different punishments as there are original sentences, whereas, under habitual criminal acts, the substantive offense is the commission of a second or additional offense and the punishment is the same to all like offenders. That escape is, in itself, a substantive offense and the punishment thereof is not merely incidental to the punishment for the offense for which the prisoner may have been committed, is ably set forth by the Superior Court of Pennsylvania in the case of *Com. ex rel.* v. *Francies,* 73 Pa. Superior Court 385. In that case the relator had been originally sentenced for false pretense, which sentence was invalid. While imprisoned on that charge, he escaped, was recaptured, tried, convicted and sentenced under the escape act of 1860. He thereupon petitioned the court for a writ of habeas corpus. The court, although admitting that he had been erroneously committed originally, nevertheless refused to issue the writ for the reason that he was clearly guilty of the offense of breaking or escaping from either a penitentiary or a jail, which is a substantive offense against the administration of public justice and hence his imprisonment on the latter charge was legal.

Petitioner therefore argues that the offense of escape is an offense in itself. In other words, as stated by the Superior Court of Pennsylvania, referred to above, "a substantive offense" and should be punished as such without regard to an original sentence, or one which may have been previously imposed. If this were not the law, that is, if the offense of escape were dependent upon or incidental to the original confinement, then the Superior Court in *Commonwealth* v. *Francies* would have been compelled to issue the writ.

Indeterminate sentence laws, which have been held valid, may be quoted as an argument by the state, however, such

cases provide for a minimum and maximum sentence, and where sentences of this kind are given all offenders are treated equally, that is, each one offending under such act is subject to an equal sentence, although the sentence itself may be an indeterminate one.

Counsel for petitioner has read the laws passed by the State Legislatures where escape laws similar to the Pennsylvania Statute involved in this case have been held invalid. The present laws passed subsequently to the original harsh legislation are much more lenient, and, furthermore, provide for a definite punishment for the crime of escape, that is, such as a five-year maximum sentence. In other words, the State Legislatures of the respective states, wherein these harsh laws were declared invalid, enacted legislation punishing the crime of escape *irrespective* of the length of time the prisoner might be serving at the time of his escape.

Counsel for your petitioner has also examined the present laws pertaining to the punishment for escape in many states throughout the entire nation, and in many of the states the laws of the respective states provide for a definite sentence, or a minimum and maximum sentence, but in no other instances than cited is the punishment made to depend upon the duration of the sentence that the prisoner is undergoing at the time of his escape.

Conclusion.

It is respectfully submitted that the writ of certiorari should be granted and the judgment below reversed.

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OCTOBER TERM, 1937

No. 25

Commonwealth of Pennsylvania, ex rel. ELMER SULLIVAN, *Petitioner*

v.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania, *Respondent*

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR PETITIONER.

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